Baheerathy a/p Arumugam v V Gunaselan a/l V Visvanathan

HIGH COURT (KUALA LUMPUR) — DIVORCE PETITION NO F-33–202 OF 2010
YEOH WEE SIAM J
6 JUNE 2012

Family Law — Children — Custodianship — Custody of children upon dissolution of marriage — Welfare of children — Whether custody, care and control of two children should be given to PW — Access — Whether RH was fit person to have access to children — Whether RH's violence and abuse of PW and children detrimental to safety and welfare of children — Maintenance — Amount to be awarded as monthly maintenance for children — Matrimonial assets — Division of property — Whether property jointly acquired — Extent of contribution by wife to welfare of family — Law Reform (Marriage and Divorce) Act 1976 ss 76(2) & 88(3)

The petitioner wife ('PW') and respondent husband ('RH'), who were married on 12 February 1999, had two daughters aged 10 and 4 respectively. Since 12 April 2009 the PW and the two children had left the matrimonial home permanently to live with PW's parents. The PW alleged that she had been chased out of the house by the RH. Thereafter, the PW applied for custody, care and control of the two children, while the RH filed a petition for judicial separation. The court granted the PW custody, care and control of the children but the RH obtained supervised access to the children on every Friday from 3pm to 4pm at the premises of the family court. The PW filed the instant divorce petition for, inter alia, the dissolution of her marriage to the RH, right of sole guardianship, custody, care and control of the two children with supervised access to the RH, monthly maintenance of RM2,000 for each of the two children, monthly maintenance of RM1,000 for herself, and the sale and equal division of the matrimonial assets, namely the jointly owned matrimonial home and the second property acquired during their marriage. At the hearing of the divorce petition the PW applied to deny the RH access to the two children. The PW submitted that the RH's negligence, violence and abuse of herself and the children were detrimental to the safety, welfare and well-being of the children. The RH submitted that there was no element of abuse or violence by him towards the children and claimed that if there had been child abuse, the case would have been referred to the child department, which was not the case here. The RH filed a cross-petition for, inter alia, a dissolution of the marriage and right of custody, care and control of the two children or alternatively access to the two children on alternate weekends and half of every school holidays. As for the matrimonial home, the RH prayed that the PW transfer her half share to the RH for him to hold the same as trustee for

the children. The RH also claimed that the PW was not entitled to a half share in the second property because it was paid for solely by the RH.

Held:

(1) In respect to the issue of guardianship, there was hardly any evidence led by either party on the matter. Based on the relevant provisions of the Guardianship of Infants Act 1961, it was clear that guardianship and custody should ideally go hand in hand. This court found that in this case, since it had been agreed by the RH that custody, care and control of the two children be given to the PW, it was for the welfare of the children that the guardianship should also be given to the PW. This court was of the view that the RH's sudden change in position with regard to custody, care and control of the children did not alter the situation. Further, this court was of the opinion that the RH had not rebutted presumption in s 88(3) of the Law Reform (Marriage and Divorce) Act 1976 ('the Act'), which presumed that it was for the good of a child below the age of 7 years to be with her mother. In arriving at this conclusion the court took into consideration the fact that both children had lived with the PW, since the separation in 2009 and the fact that the RH had hardly seen the children during the supervised access granted to him under the interim order (see paras 14, 18, 19 & 21).

(2) In determining whether the RH was a fit person to have access to the two children and the terms of such access, the court had to consider the evidence of abuse of the PW which was relevant to show the abusive character of the RH, which would have an impact on his relationship and treatment of the two children. The evidence showed that the first child had expressed great aversion, fear and hatred of the RH, while the second child was able to interact with the RH if the first child was not around. After considering the evidence and based on the court's interviews of the children it was found that despite having a good and happy family relationship at one time, the marital disputes between the PW and the RH and the abusive acts of the RH had led to the first child being completely alienated from the RH. The PW knew of this but had failed to make any efforts to take the first child for psychological help or counseling to correct the problem. This court recognized that this would be detrimental to the wholesome development and growth of the first child and therefore decided to order that she be sent for psychological help to heal her relationship with her father. Thereafter the RH was to be allowed supervised access to the first child before any further order as to access was made (see paras 72, 74 & 75).

(3) As for the second child, this court found that this child had the right of access to her father. As such, it was decided that the RH was to be allowed a weekly supervised access of three hours on every Sunday from 11am to

2pm in the presence of the PW with one of the paternal grandparents to accompany the RH during these visits. After 9 months from the date of this order, access to this child would be reviewed by this court upon application by either party (see para 76).

(4) After considering the financial situation of both parties and their present circumstances, the court was satisfied that a reasonable sum of maintenance that the RH should pay for the children was RM1,200 per month from the date of this order until the child attained the age of 18 years. As for past maintenance for the children, the RH was ordered to pay a maintenance of RM600 per month for the two children from the date of the filing of the petition until the day before the date of this order (see paras 85 & 86).

(5) The guiding principle under s 76(2) of the Act was for the court to incline towards equality of division of the matrimonial assets if both parties had acquired the asset by their joint efforts. In this case, the party who made more monetary contributions and put in more effort to acquire the asset should receive a greater proportion. This court decided that the PW should be given a 30% share, by reason of her non-monetary contributions, and the RH a 70% share of the matrimonial home. Based on the evidence this court was of the view that it was highly probable that the RH, who earned more than the PW, was the one who made monetary contributions to the acquiring of the matrimonial home. As for the second property, purchased in 2007, the court held that the PW should only be given a 15% share of it, given the short period of her non-monetary contributions, and the RH a 85% share of it. There was clear evidence that the RH had acquired the second property by his sole monetary contributions (see paras 89, 116 & 120).

(6) The PW's claims for the return by the RH of the jewellery of the PW and the children were dismissed because no cogent evidence was adduced by PW to prove this claim. Similarly, the RH's claims for the return of jewellery, cars and monies given to PW and her family were also dismissed (see paras 122 & 124).

(7) As there was no evidence of the PW being an unfit mother, there was no necessity for this court to order a psychiatric evaluation of the PW to determine her fitness as a mother. As for the RH, it was found that although he loved his children, he had anger issues. However, this court made no order for the RH to undergo psychiatric treatment. Instead it found that it would be for the benefit of the RH and for the welfare and best interests of the children for him to seek professional help (see paras 129 & 131).

[Bahasa Malaysia summary

Isteri pempetisyen ('IP') dan suami responden ('SR'), telah berkahwin pada 12 Februari 1999, mempunyai dua orang anak perempuan berumur 10 dan 4

tahun masing-masing. Sejak 12 April 2009, IP dan dua anak-anak tersebut telah meninggalkan rumah kelamin untuk menetap secara tetap dengan ibubapa IP. IP mendakwa bahawa dia dihalau keluar daripada rumah oleh SR. Selepas itu, IP memohon untuk jagaan, pemeliharaan dan kawalan dua anak-anak tersebut, manakala SR memfailkan petisyen untuk pemisahan kehakiman. Mahkamah memberikan IP jagaan, pemeliharaan dan kawalan anak-anak tersebut tetapi SR mendapat akses diselia kepada anak-anak tersebut pada setiap Jumaat daripada pukul 3 petang sehingga 4 petang di premis mahkamah keluarga. IP memfailkan petisyen perceraian segera untuk, antara lainnya, pembubaran perkahwinannya dengan SR, hak penjagaan tunggal, jagaan, pemeliharaan dan kawalan kedua anak-anak dengan akses diselia kepada SR, nafkah bulanan sebanyak RM2,000 untuk setiap anak-anak, nafkah bulanan sebanyak RM1,000 untuk dirinya sendiri, jualan dan pembahagian sama rata aset-aset perkahwinan, iaitu rumah kelamin yang dimiliki bersama dan harta kedua yang diperolehi semasa perkahwinan mereka. Pada pendengaran petisyen perceraian, IP memohon untuk menafikan akses SR kepada kedua anak-anak. IP menghujah bahawa kecuaian, keganasan dan penderaan terhadap dirinya dan anak-anak memudaratkan keselamatan, kebajikan dan kesejahteraan anak-anak. SR menghujah bahawa tiada elemen penderaan atau keganasan olehnya terhadap anak-anak dan mendakwa bahawa sekiranya terdapat penderaan anak-anak, kes tersebut sepatutnya dirujuk kepada jabatan anak-anak, yang bukan merupakan kes di sini. SR memfailkan petisyen balas untuk, antara lainnya, pembubaran perkahwinan dan hak jagaan, pemeliharaan dan kawalan kedua anak-anak atau akses secara alternatif kepada dua anak-anak pada hujung minggu berganti dan sebahagian setiap cuti sekolah. Untuk rumah kelamin, SR memohon bahawa IP memindahkan separuh perkongsian kepada SR supaya dia boleh memegangnya sebagai pemegang amanah untuk anak-anak. SR juga mendakwa bahawa IP tidak berhak untuk separuh perkongsian dalam harta kedua kerana ia dibayar sepenuhnya oleh SR.

Diputuskan:

(1) Berhubung isu penjagaan, tiada keterangan dikemukakan oleh mana-mana pihak mengenai perkara ini. Berdasarkan peruntukan relevan Akta Penjagaan Kanak-Kanak 1961, jelas bahawa penjagaan dan jagaan secara idealnya harus seiring. Mahkamah ini mendapati bahawa dalam kes ini, memandangkan ia telah dipersetujui oleh SR bahawa jagaan, pemeliharaan dan kawalan kedua anak-anak diberikan kepada IP, maka untuk kebajikan anak-anak, penjagaan seharusnya juga diberikan kepada IP. Mahkamah ini berpendapat bahawa perubahan tiba-tiba SR dalam kedudukan berhubung jagaan, pemeliharaan dan kawalan anak-anak tidak mengubah keadaan. Selanjutnya, mahkamah berpendapat bahawa SR tidak menyangkal anggapan dalam s 88(3) Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976

('Akta'), yang menganggap bahawa untuk kebaikan anak di bawah umur 7 tahun untuk berada dengan ibunya. Dalam membuat kesimpulan ini, mahkamah mempertimbangkan fakta bahawa dua-dua anak tinggal bersama dengan IP, sejak perpisahan pada 2009 dan fakta bahawa SR jarang berjumpa dengan anak-anak semasa akses diselia diberikan kepadanya di bawah perintah interim (lihat perenggan 14, 18, 19 & 21).

(2) Dalam menentukan sama ada SR merupakan orang yang layak mempunyai akses kepada dua anak-anak tersebut dan syarat-syarat bagi akses tersebut, mahkamah perlu mempertimbangkan keterangan penderaan oleh IP yang relevan bagi menunjukkan watak kesat SR, yang akan mempunyai impak ke atas hubungannya dan layanan terhadap dua anak-anak tersebut. Keterangan menunjukkan bahawa anak pertama menunjukkan kebencian, ketakutan dan penolakan terhadap SR, manakala anak kedua mampu berinteraksi dengan SR sekiranya anak pertama tiada. Selepas mempertimbangkan keterangan dan berdasarkan temuramah mahkamah terhadap anak-anak, didapati bahawa meskipun pernah mempunyai hubungan keluarga yang baik dan gembira pada suatu ketika dahulu, pertikaian perkahwinan di antara IP dan SR dan tindakan kasar SR telah menjadikan anak pertama benar-benar terasing daripada SR. IP mengetahui perkara ini tetapi gagal untuk membuat sebarang usaha untuk membawa anak pertama mendapatkan bantuan psikologi atau kaunseling untuk memperbetulkan masalah tersebut. Mahkamah ini menyedari bahawa ini akan menjejaskan perkembangan dan pembesaran anak pertama dan oleh itu memutuskan untuk mengarahkan agar dia dihantar untuk bantuan psikologi bagi memulihkan hubungannya dengan ayahnya. Selepas itu, barulah SR dibenarkan untuk akses kepada anak pertama sebelum perintah lanjutan untuk akses (lihat perenggan 72, 74 & 75).

(3) Bagi anak kedua, mahkamah ini mendapati bahawa anak ini mempunyai hak akses kepada ayahnya. Oleh itu, diputuskan bahawa SR dibenarkan untuk akses diselia mingguan sebanyak tiga jam setiap Ahad daripada 11 pagi hingga 2 petang dengan kehadiran IP dengan seorang daripada datuk atau nenek sebelah bapa untuk menemani IP semasa lawatan ini. Selepas 9 bulan daripada tarikh perintah, akses kepada anak ini akan disemak semula oleh mahkamah ini apabila permohonan dibuat oleh mana-mana pihak (lihat perenggan 76).

(4) Selepas mempertimbangkan keadaan kewangan kedua-dua pihak dan keadaan mereka sekarang, mahkamah berpuas hati bahawa jumlah nafkah munasabah yang perlu dibayar oleh SR untuk anak-anak RM1,200 sebulan daripada tarikh perintah ini sehingga anak tersebut mencapai umur 18 tahun. Bagi nafkah terdahulu anak-anak, SR

diarahkan untuk membayar nafkah RM600 sebulan untuk kedua-dua anak daripada tarikh pemfailan petisyen sehingga tarikh perintah ini (lihat perenggan 85 & 86).

(5) Prinsip yang digunakan mahkamah sebagai panduan di bawah s 76(2) Akta cenderung ke arah keadilan pembahagian aset perkahwinan sekiranya kedua-dua pihak telah memperoleh aset tersebut melalui usaha bersama mereka. Dalam kes ini, pihak yang membuat sumbangan kewangan lebih dan memberikan usaha lebih bagi memperolehi aset tersebut seharusnya menerima bahagian yang lebih besar. Mahkamah ini memutuskan bahawa IP seharusnya diberikan 30% saham, atas alasan sumbangan bukan dari segi kewangan dan SR sebanyak 70% saham rumah kelamin. Berdasarkan keterangan, mahkamah berpendapat bahawa SR berkemungkinan besar membuat sumbangan kewangan bagi mendapatkan rumah kelamin memandangnya dia bergaji lebih besar berbanding IP. Untuk harta kedua yang dibeli pada 2007, mahkamah memutuskan bahawa IP seharusnya diberikan 15% saham, berdasarkan sumbangan bukan dari segi kewangan olehnya dan SR sebanyak 85% saham. Terdapat keterangan jelas bahawa SR memperolehi harta kedua melalui sumbangan kewangannya semata-mata (lihat perenggan 89, 116 & 120).

(6) Tuntutan-tuntutan IP untuk pemulangan barang kemas IP oleh SR dan anak-anak ditolak kerana tiada keterangan kukuh dikemukakan oleh IP untuk membuktikan tuntutan ini. Begitu juga, tuntutan-tuntutan SR untuk pemulangan barang kemas, kereta-kereta dan duit yang diberikan kepada IP dan keluarganya juga ditolak (lihat perenggan 122 & 124).

(7) Memandangkan tiada keterangan menunjukkan IP sebagai ibu yang tidak layak, tiada keperluan untuk mahkamah ini mengarahkan satu penilaian psikiatri untuk IP bagi menentukan sama ada dia berkelayakan sebagai seorang ibu. Bagi SR, didapati bahawa meskipun dia menyayangi anak-anaknya, dia mempunyai isu kemarahan. Walau bagaimanapun, mahkamah ini tidak mengarahkan SR untuk menjalani rawatan psikiatri. Sebaliknya, mahkamah ini mendapati bahawa adalah untuk manfaat SR dan kebajikan serta kesejahteraan anak-anak, maka dia seharusnya mendapatkan bantuan profesional (lihat perenggan 129 & 131).]

Notes

For cases on custodianship, see 7(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 3318–3411.

Cases referred to

Ananda Dharmalingam v Chantella Honeybee Sargon (P) and other Appeals [2007] 2 MLJ 1; [2007] 1 CLJ 481, CA (refd)

F (An Infant), Re [1969] 2 All ER 766, HC (refd)

Gan Koo Kea v Gan Shiow Lih (f) [2003] 4 MLJ 770, HC (refd)
Ko (An Infant), Re [1990] 1 MLJ 494, HC (refd)
L v S [2002] 7 MLJ 584, HC (refd)
Sivanes a/lRajaratnam v Usha a/p Rani Subramaniam [2002] 3 MLJ 273; [2002] 3 CLJ 300, CA (refd)
W v H [1987] 2 MLJ 235 (refd)

Legislation referred to

Guardianship of Infants Act 1961 ss 2(1), (2), 3, 5, 11
Law Reform (Marriage and Divorce) Act 1976 ss 76, 76(2), 88, 88(2), (3), 89(1), (2), 102

Ravi Muniandy (Uma Devi together with him) (Ravi Muniandy) for the petitioner wife.
Ramesh Sivakumar a/l R Ramaveloo (Ramesh & Loo) for the respondent husband.

Yeoh Wee Siam J:

[1] This is my judgment regarding the divorce petition filed by the petitioner wife ('the PW') in encl 1, and the cross-petition of the respondent husband ('the RH') in encl 9.

ENCLOSURE 1

[2] In encl 1 the PW prayed for the following reliefs:

(a) that the marriage between the PW and the respondent husband ('the RH') be dissolved;

(b) right of guardianship, custody, care and control of both children of the marriage, SD ('the first child') (date of birth: 15 March 2002) and R ('the second child') (date of birth: 6 December 2007), ('the children'), be given solely to the PW;

(c) the RH obtains a medical certificate on his mental state of mind from a Government Hospital before seeking access for the children and if the court still decides to give access (although the RH is an abuser) to the RH, the access that is given shall be as follows:

(i) The RH is given supervised access to the children (in the presence of the PW) wherein the access is to be held at the Bilik Kanak-Kanak Mahkamah Tinggi Keluarga Kuala Lumpur for one hour, once a month on a Friday between 3pm–4pm until the PW is of the opinion that the RH is not dangerous to the life of the children and the children are comfortable and not threatened by the RH's presence. Thereafter, the RH's access to the children shall be reviewed again by this honourable court;

(d) the RH pays RM2,000 for each child towards the maintenance in arrears from the date the PW and the children were chased out of the house ie commencing 12 April 2009 till the date of dissolution of the marriage. The maintenance in arrears is to be paid to the PW within seven days from the dissolution of the marriage;

(e) the RH pays monthly maintenance to the children amounting to RM2,000 for each child from the date of dissolution of marriage. The said sum of RM2,000 shall be revised based on the children's requirements from time to time until the child reaches the age of 18 years old or obtains their diploma or degree (whichever is later). The monthly maintenance shall be credited into the PW's account on or before the third of every month;

(f) the RH shall pay the sum of RM1,000 as maintenance for the PW;

(g) the RH shall sell the jointly owned matrimonial property with the property address at D-13-2, Seri Puri Apartment, Desa Aman Puri, Jalan Aman 52200 Kuala Lumpur and No 19, Jalan SD 10/5F, Bandar Sri Damansara, 50200 Selangor at the best price within three months from the date of dissolution of marriage and thereafter fifty percent (50%) of the revenue from the sale shall be given to the PW within seven days from the date of receipt of the sale revenue;

(h) the RH shall return all the jewellery belonging to the PW and the children;

(i) the costs of this action are to be borne by both the PW and the RH respectively;

(j) both the PW and the RH are given the liberty to apply for variation; and

(k) other reliefs as deemed fit by this honourable court.

[3] At the hearing, the PW revised her prayer regarding access. She is now seeking that no access be given to the RH for both children. The PW also withdraws her claim for maintenance for herself as a wife.

[4] In his answer and cross-petition (encl 9), the RH prayed for the following reliefs:

(a) the marriage between the PW and the RH as registered on 12 February 1999 at the Hindu Council Sangam Wilayah Persekutuan Kuala Lumpur be dissolved;

(b) the RH is given the right of care, custody and control towards both the children of the marriage;

(c) the PW is to be examined by a psychiatrist as to the mental state of mind

and capability as a mother and a report is to be given to this honourable court within 60 days from the date of this order;

(d) alternatively, if the PW is given the care, custody and control of the children of the marriage then the RH shall:

(i) agree to pay RM500 monthly towards both the children;

(ii) access is given to the children of the marriage on alternate weekends from Saturday 10am to Sunday 7pm, half of every school holidays, festive days and birthdays, alternate, every year;

(e) that the PW returns:

(i) marriage jewellery and thali amounting to RM50,000;

(ii) RM10,000 for the cars purchased by the RH for the PW;

(iii) RM48,000 (RM500 monthly) that was given to the PW's mother; and

(iv) RM12,600 withdrawn by the PW from the HSBC joint account without the RH's consent;

(f) that the PW transfers half share belonging to the PW in the Seri Puri Apartment to the RH and the RH shall hold the property as trustee for the children of the marriage and for their future education;

(g) that the PW transfers half share belonging to the PW in the property at Bandar Sri Damansara which was paid solely by the RH to the RH;

(h) that the RH shall take medical insurance for the children;

(i) that the PW pays for the costs of these proceedings; and

(j) any other relief that the court deems fit and proper.

THE BACKGROUND FACTS

[5] The PW and the RH were married on 12 February 1999 (see marriage certificate at exh P6). The first child, SD, a girl, was born on 15 March 2002 (see birth certificate at BOD B p 2, exh 7). She is now ten years and two months old. The second child, R, a girl, was born on 6 December 2007 (see birth certificate at BOD B p 3, exh P7). She is now four years and six months old.

[6] In April 2008, the PW left the matrimonial home temporarily, together with the two children, due to irreconciliable differences with the RH. They stayed at the house of the PW's parents at No 12, Jalan 2, Taman Kepong, Kuala Lumpur. On 12 April 2009, the PW left the matrimonial home

permanently, together with the two children. She alleged that they were chased out from their home by the RH. Since then, they have been living at her parents' house.

[7] On 4 May 2009 the PW filed an Originating Summons No S8–24–46 of 2009 ('the OS') for custody, care and control of the twochildren. On 7 May 2009, the RH filed a petition for judicial separation ('the JS petition') at the Kuala Lumpur High Court vide Petition No S8–33–647 of 2009. On 11 February 2010 the PW filed this divorce petition in encl 1.

[8] On 25 May 2009, in the JS petition, the RH obtained an order from the Kuala Lumpur High Court for interim access to the two children. On 12 June 2009, the Kuala Lumpur High Court varied the interim access order dated 25 May 2009 and granted, by consent of both parties, interim access to the RH to visit his two children on every Friday of each week from 3pm–4.15pm at the premises of the family court. Such access is to be supervised by an officer and/or interpreter of the family court.

[9] On 29 November 2011 the OS was withdrawn by the PW and struck out by the court, with no order as to costs.

ISSUES NOT FOR TRIAL

(a) Both parties have agreed to the divorce and the decree nisi is to be made absolute forthwith;

(b) the PW withdrew her claim for maintenance for the wife; and

(c) at the outset of the trial, counsel for the RH informed the court that the RH has agreed that custody, care and control of the two children be given to the PW. There was no mention about guardianship.

ISSUES TO BE TRIED

[10] The trial was conducted for the following issues:

(a) guardianship;

(b) access to the two children by the RH;

(c) maintenance to be paid by the RH for the two children;

(d) division of matrimonial assets;

(e) the PW's claim for return by the RH of jewellery belonging to her and the children; and

(f) the RH's other claims in para 141(e)(i)–(iv) of his cross-petition.

DECISION OF THE COURT ON THE PETITION (ENCL 1) AND CROSS PETITION (ENCL 9)

[11] After considering the evidence, submissions and authorities of both parties, I gave the following decision on 31 May 2012:

(a) the marriage is dissolved. The decree nisi is to be made absolute forthwith;

(b) sole guardianship, and custody, care and control of the two children of the marriage, SD and R, be given to the PW;

(c)
(i) access to the two children is given to the RH as follows:
First child:

(A) for the first three months from the date of this order, no access is to be given to the RH. During this period, the PW is ordered to bring the child for counselling and/or treatment for not less than two times a month by an accredited psychiatrist/psychologist/counsellor to be agreed to by both parties;

(B) after the first three months, for a period of another six months, the RH is given access fortnightly, and access is to be in the presence of the PW, and to be assisted by an accredited psychiatrist/ psychologist/counsellor. The duration of the access is to be according to the date and time agreed to by both parties and the psychiatrist/ psychologist/counsellor, which duration should not be less than 90 minutes;

(C) after nine months from the date of this order, either party has liberty to apply to the court for further orders regarding access by the RH to the first child; and

(D) the costs of the accredited psychiatrist/psychologist/ counsellor are to be borne equally by both parties.

Second child:
The RH is given reasonable access to the second child as follows:

(A) access for three months from the date of this order on every Sunday from 11am–2pm at McDonald's restaurant, which restaurant is to be agreed to by both parties. Access is to be in

A the presence of the PW. During access, the RH is allowed to be accompanied by his mother or father;

(B) after the first three months, for a period of another six months, the RH is given access, without the presence of the PW, on every Sunday from 10am–7pm;

B

(C) after nine months from the date of this order, either party has liberty to apply for further orders regarding access, by the RH to the second child;

C (ii) .

(A) the RH is ordered to undergo a psychiatric evaluation, within nine months from the date of this order, to determine his fitness in having continued or extended access to the two children;

D

(B) such psychiatric evaluation is to be conducted by an accredited psychiatrist to be agreed to by both parties. The psychiatric evaluation report is to be given by the psychiatrist to the RH and the PW;

E

(C) the costs of the psychiatric evaluation and report are to be borne by the RH; and

(D) the psychiatric evaluation report is to be tendered for consideration by the court in any application to be made by either party, after nine months from the date of this order, regarding the RH's continued or extended access to the two children.

F

(d) The RH is ordered to pay maintenance of the two children as follows:

G (i) past maintenance at RM600 per month for two children from the date of filing of the divorce petition to the day before the date of this order, to be paid by the RH to the PW within six weeks from the date of this order; and

(ii) current maintenance of RM1,200 per month for two children from H the date of this order until the respective child attains the age of 18 years, and such sum is to be credited by the RH into the bank account of the PW on or before the fifth day of each month.

(e) The matrimonial assets are to be divided as follows:

I (i) property at No D-13-2, Seri Puri Apartment, Desa Aman Puri, Jalan Aman, 52200 Kuala Lumpur ('the first property'):

PW: 30% share

RH: 70% share.

(ii) property at No 19, Jalan SD 10/15F, Bandar Sri Damansara, 52200 Kuala Lumpur ('the second property'):

PW: 15% share

RH: 85% share.

If any party wishes to retain any of the above properties, then that party is required to pay in cash, within four months from the date of this order, the equivalent of the above respective share of the property based on the net value of such property. In the event of a dispute on the market value of the property, such market value is to be determined by an independent valuer to be appointed upon mutual agreement by both parties. The costs of such independent valuer are to be borne equally by both parties.

(f) the PW's claim for maintenance for the wife has been withdrawn and is struck out;

(g) the PW's claim for return of all the jewellery belonging to the PW and the children is dismissed;

(h) the RH's claims in prayers 141(e)(i)–(iv) of the cross-petition (encl 9) are dismissed;

(i) the interim order dated 12 June 2009 on access is revoked; and

(j) costs are to be borne by the respective parties.

THE REASONS FOR THE COURT'S DECISION

Guardianship, and custody, care and control of the children

[12] At the outset of the hearing on 27 July 2011, counsel for the RH informed the court that divorce, and custody, care and control of the two children are agreed upon by the parties and are not issues for trial, and the only issue left for trial is the RH's access to the children. The hearing proceeded on that basis.

[13] However, in his written submissions, counsel for the RH submitted that the RH prays for custody, care and control of the children. I am of the opinion that the RH and his counsel cannot blow hot and cold, or suddenly change the RH's position regarding custody, care and control. Since on record, the RH had already agreed to custody, care and control of the two children being given to the PW, I therefore ordered accordingly.

[14] As for the issue of guardianship, there is hardly any evidence led by

either party on the matter. I considered the matter according to the Guardianship of Infants Act 1961 ('the GIA'). The relevant provisions of the GIA are:

> Equality of parental rights
>
> 5.
>
> (1) In relation to the custody or upbringing of an infant or the administration of any property belonging to or held in trust for an infant or the application of the income of any such property, a mother shall have the same rights and authority as the law allows to a father, and the rights and authority of mother and father shall be equal.
>
> (2) The mother of an infant shall have the like powers of applying to the Court in respect of any matter affecting the infant as are possessed by the father.;
>
> Matters to be considered
>
> 11. The Court or a Judge, in exercising the powers conferred by this Act, shall have regard primarily to the welfare of the infant and shall, where the infant has a parent or parents, consider the wishes of such parent or both of them, as the case may be.

[15] Under s 5 of the GIA, the PW and the RH, being the mother and father respectively of the two children, have equal rights to the custody and upbringing of the infant ie a child who has not attained his majority (see the definition of 'infant' in s 2(1), and s 2(2) of the GIA).

[16] Apart from considering the wishes of the parents under s 11 of the GIA, the court shall have regard to the welfare of the infant when exercising its powers under the same Act.

[17] The duties of a guardian are provided in s 3 of the GIA ie he shall be responsible for the infant's support, health and education.

[18] From the above provisions of the GIA, it is clear that the right of guardianship includes the right of custody and upbringing of an infant. Thus, guardianship and custody should ideally go hand in hand together.

[19] In this case, since it has been agreed by the RH that custody, care and control of the two children be given to the PW, in my opinion, it is for the welfare of the children that their guardianship be given to the PW as well. This is to ensure that the PW would be fully independent and able to discharge her duties and responsibilities as the custodian and guardian of the children

without having to consult or await a consensus from the RH for the upbringing of the children on a daily basis, more so in view of the highly acrimonious relationship between the PW and the RH.

[20] Assuming that the court considers the issue of custody, care and control in view of the RH's change in stance during the stage of written submissions, I am satisfied, based on the evidence, that the PW should still be given custody, care and control of the children on the ground that the RH, at this point, is not fit to be given the same, and it would not be for the welfare of the children if he is granted such custody, care and control. The unsuitable character and negative parenting skills of the RH will be dealt with later on in this judgment under the issue of access.

[21] I also considered s 88 of the LRA and, in particular, the rebuttable presumption in s 88(3) where it is presumed that it is for the good of a child below the age of seven years to be with her mother, but in deciding whether that presumption applies to the facts of any particular case, the court shall have regard to the undesirability of disturbing the life of a child by changes of custody (see *L v S* [2002] 7 MLJ 584 at pp 593, 600 and 601). In this case, the second child is only four years old. The RH has not rebutted the presumption in s 88(3) of the LRA and I think it is for the good of this child to be with her mother. Both children have been in the care of the PW all these years. The RH was frequently overseas for work. Since the separation in 2009, both children live with the PW. The RH hardly sees the children even though weekly supervised access is given to him under the interim order dated 12 June 2009. It is for the welfare of these two children that the PW continues to have custody, care and control over them. Any change in custody, care and control at this difficult period in their lives would destabilise them and this would be detrimental to their development and growth, in particular the first child who now totally rejects the RH as her father (see also *W v H* [1987] 2 MLJ 235 at p 243, *Re Ko (An Infant)* [1990] 1 MLJ 494 at p 501 citing *Re F (An Infant)* [1969] 2 All ER 766 at p 770, and *Gan Koo Kea v Gan Shiow Lih (f)* [2003] 4 MLJ 770 at p 776).

RH's access to the children

[22] Under s 89(1) of the LRA, when the court makes an order for custody, the court may impose such conditions as it deems fit.

[23] Under s 89(2) of the LRA, an order for custody may, inter alia:

(a) contain conditions as to the place where the child is to reside, as to the manner of his or her education and as to the religion in which he or she is to be brought up;

(b) provide for the child to be temporarily in the care and control of some person other than the person given custody;

(c) provide for the child to visit a parent deprived of custody or any member of the family of a parent who is dead or has been deprived of custody at such times and for such periods as the court may consider reasonable;

(d) give a parent deprived of custody or any member of the family of a parent who is dead or has been deprived of custody the right of access to the child at such times and with such frequency as the court may consider reasonable; or

(e) prohibit the person given custody from taking the child out of Malaysia.

[24] The PW is applying to deny the RH of access to the two children in view of her allegations of the RH's abuse of the PW and the children, and the RH's behaviour, negligence and violence which are detrimental to the safety, welfare and wellbeing of the children.

[25] Under s 88(2) of the LRA, in deciding custody of a child, the paramount consideration is the welfare of the child. In my opinion, this criteria should similarly apply when the court considers the issue of access.

[26] The issue is whether the RH is a fit person to have access to the two children, and if so, what should be the proper terms of access which are for the welfare of the children.

PW's evidence

[27] The PW gave extensive evidence of the RH's arrogance and violence. She testified of the RH's violent abuse of her over seven years. She exhibited the original CD (exh P10) of the recording that she made of a previous conversation between her and the RH (note: this was recorded by her without the RH's knowledge). The transcripts of the recording in the CD (exh P9, pp 17–41 of BOD B) show that the RH admitted to whacking the PW frequently, calling her a bitch and getting angry frequently especially when things get missing eg the toys or floaters of the children. The RH, in the conversation, admitted that he could get very aggressive with the PW, and he passed bad remarks on the PW's family eg calling the PW's sister a bitch, shouting at the PW's mother. Whenever the RH wanted to hurt the PW, he would go for her family because that is where it hurts the most. The RH admitted that he has an attitude problem and he can be aggressive sometimes, not with everybody, but with the PW. The PW stated that the RH used to tell the PW to get out of the house but she did not want to leave. The RH then said that he would leave.

[28] The transcripts also showed that sometimes the RH would beat the PW, or physically or verbally abuse her because of the words or acts of, or the provocation caused by the PW eg the PW would lose or misplace things and this upsets the RH because he hates losing things, the PW would be always protecting her family and 'taruh ing' the RH (see p37 para 2 of exh P9), the PW 'taking it out' on the RH, so the RH would take it out on her family (see p 29, para 4 of exh P9), the PW would make an issue and then the RH would want to hurt her where it hurts her most and go for her family eg her mother (see p 26, paras 5–6 of exh P9), and the PW asking the RH to leave (see p 40, paras 6–8 of exh P9).

[29] The PW's evidence and the evidence of her friend, Roniha bt Abd Rahim (PW2), were mainly on the abuse of the PW by the RH. At this juncture, it is important to note that abuse of the PW by the RH is not an issue here since both parties have agreed to the divorce. However, evidence of abuse of the PW is relevant to show the aggressive and abusive character of the RH which would impact on his relationship, upbringing and treatment of the children.

[30] Regarding the abuse of the children by the RH, the PW relied on her own evidence, the evidence of PW2, and the reports of Raymund N.C. Jagan ('Mr Raymund'), the counsellor or psychology officer at the Welfare Department, Kuala Lumpur (PW3) and Dr Subash Kumar Pillai ('Dr Subash'), associate professor and consultant psychiatrist at University Malaya Medical Centre (PW4).

[31] The PW stated the following.

[32] In 2005 the RH hit her with his hands because he could not find the remote control. He threatened to throw the PW down the 13th floor. The PW's father then immediately came to fetch her and the first child and they left for her parents' house.

[33] From 2005 to 2006, the RH would use vulgar words towards her and the first child. He would also hit the PW and the first child. Here, I note that no police report or medical report was produced.

[34] In 2008, for some reason the RH was angry with the first child and said that the first child had better behave, if not she would become a prostitute. When the PW confronted him not to use such word, he hit the PW with his hand. The PW alleged that the RH would call the first child a pariah, useless, bloody fool, medusa, ugly, 'gigi jongang' (protruding teeth) and dracula, and say that she is not his daughter. In his email dated 20 April 2005 to the PW (exh P11, BOD p 97) the RH stated that after all he is not close to the first child

anyway. On 13 March 2009 he sent an email to the PW (exh P12, BOD B p 109) that if the PW does not want the first child to have a dad, it is fine with him.

[35] On 6 April 2008 they were in the process of shifting house. The RH was angry when the PW's sister could not come to help. He then kicked the PW's stomach and punched her head and hit the PW with the rod. The PW's mother and the first child tried to stop him. The RH then instructed all of them to get out of the house. The PW, her mother and the first child left for fear that he would become more violent.

[36] The PW stated that she did not make a police report every time she and the first child were hit because she prayed and hoped that he would change and as usual he would promise not to abuse them again. She was also worried for his job if she reported him. Due to those reasons, she informed the doctor that she fell from the stairs instead. She only relayed this to her friend, PW2, who advised her to lodge a police report against the RH but the PW did not do so for the same reason.

[37] On 15 February 2009 at about 7am, when the PW and the two children were leaving the house to attend a function at the temple, the RH kicked her and warned her not to go. When the PW and the first child begged him to allow them to go, he locked them up and changed the locks so that they could not leave and said that if they did, he would kill the PW. However, the first child cried and pleaded with him, and held the RH's legs to allow them to leave. The RH then asked them to leave and never come back. He changed the locks and they managed to leave. The RH would always change the locks. Later, the PW and the children returned home. At about 7pm when the RH returned from his football session, he saw them and, for no reason, he hit the first child's head and started shouting and chased them out of the house (see also the email dated 30 March 2009 from the RH to the PW in exh P15 at BOD B p 111).

[38] There were times after the RH's drinking sessions when he would get very violent if the PW and the first child did not follow the RH's exact instructions. He would get angry and hit the PW and the first child (see also the email dated 9 September 2008 from the RH to the PW in exh P16 at BOD B p 107).

[39] According to the PW, whenever the RH started being more violent, the children were in danger, especially the first child. The RH would hit the first child for minor things that agitated him. During the fights between the RH and the PW, there were times when the first child started packing things and said that she did not want to live with her father anymore and she wanted to remain in her maternal grandparents' house, but the PW would ask the first

child to follow her since her father (the RH) had apologised. With a heavy heart, the first child would return. The PW contended that the RH would always apologise and say that he loves the PW and the children and he would change, but he did not. The PW felt that the abuse was due to the RH's family background. The PW was informed by the RH that his parents used to hit each other and he told her that he hated his parents because they abused him.

[40] The PW's mother-in-law was aware of the abuse by the RH as the first child had informed her numerous times that her father had hit her, but she told the first child not to mention that to anyone and that the 'abuse' was normal.

[41] The PW contended that in the transcript in exh P9 it showed that the RH does not care for the welfare of the children and at one time the PW and the children had to sleep in the hall upstairs, without pillows and blankets, and the second child was still a baby then. The first child packed her bags to leave the house as she was in fear. She told the PW that she wanted to go to the house of the PW's parents. The first child was also very upset as she was not allowed to sleep on her bed and had to sleep on the floor as the RH had locked all the rooms to prevent the PW and the children from using the rooms to sleep.

[42] On 12 April 2009 the RH asked the PW to see him and bring the kids as he wanted to see them. When they walked into the house, the RH started using vulgar words. Because the PW kept quiet, the RH chased all of them out of the house. At the door he threw a didgeridoo, ie a long and heavy aboriginal musical instrument weighing approximately 8 kg and 5 ft long, at them and shouted vulgar words. The PW was then carrying the second child. The PW and the children managed to avoid the didgeridoo. Unhappy that it did not hit them, the RH threw the didgeridoo on the PW's car. At 7.30 pm he went to the house of the PW's parents and shook the gate aggressively and broke the elephant statue into pieces. Then he left. The PW and the first child were afraid and, for the first time, for the safety of the PW and her children and family, she made a police report (exh P18, at BOD B p 42).

[43] The PW contended that because the first child was so traumatised, she took the child to see a counsellor ie Mr Raymund.

[44] Mr Raymund's report dated 12 May 2009 (exh P19 at BOD B pp 5–9) stated what the first child told Mr Raymund during his counselling session with her.

[45] The RH is her father. He always beats and gets angry with her mother (the PW). Her father (the RH) does not like her mother. The first child has seen

her father hitting her mother's head on the cabinet. Her father pushed her mother until her mother fell from the stairs in their house. The first child is very angry at her father.

[46] The first child said that her father is very hot-tempered and she is fearful of him. Ever since she was four years old, her father was always scolding her and telling her that she is useless, and that she is not his daughter. He called her a bloody fool. Whenever he was angry, her father would tell the children to get out of the house.

[47] The first child stated that her father had never mentioned that he loves her. Ever since she was young, her father did not like to feed her and did not like to share his food with her. Her father would not like it if she touched the table while he was eating.

[48] The first child said that her father had thrown a musical instrument ie a didgeridoo at her leg and after that in the direction of the car.

[49] The child stated further that her father had hit her head twice ie by pushing hard with his open palm. She had seen him doing that once to her younger sister ie the second child.

[50] The first child informed Mr Raymund that she loves her mother very much but does not love her father at all. She does not wish to live with her father.

[51] In Dr Subash's medical report dated 13 February 2010 (exh P4 at BOD B, pp 11–16) he stated that he conducted the interview of the first child without the presence of her mother or father. During the interview, the first child said that she remembered how her father had called her names and scolded her for the trivial mistakes she made. She recalled how he had called her a dracula and also a pariah on many occasions. She also said that her father was angry all the time and often told them to get out of their house. She said that he punched her head and slapped her many times and she does not know why he did it to her. She was not sure when he would get angry. Once, the first child wanted to go to a birthday, but her father locked her and her mother and sister in a room.

[52] The first child said that her mother brought the children to see their father because he wanted to see them. However, her father became angry when he saw her taking some of her dolls. He then threw the didgeridoo at the first child and her mother. The family ran to the car but he threw it again and it hit the car. The first child said that she was very afraid of him after that and the family never returned home to see her father after the incident.

[53] The first child also said that her father came to her school and threatened her. He confronted her in her school and asked why she told things about him to the judge. She also stated that her father threatened to gun the family down if she kept telling the judge things about him. She said she is very afraid of her father.

[54] Dr Subash concluded that he felt that the first child was telling the truth and felt that she was visibly distressed with abuse on her and her mother. She seemed to be very scared about her father and did not want to be with him or see him again. From his interview with the first child, Dr Subash felt that the first child has none or very limited attachment towards her father.

RH's evidence

[55] On the other hand the RH prayed for unsupervised access to be given to him and his old and ailing parents.

[56] Counsel for the RH submitted that there is no element of abuse or violence by him towards the children. If it were so, the court would not have granted interim access to the RH vide the court orders dated 27 May 2009 and 12 June 2009.

[57] Although the PW and the RH were not getting along, and the PW had accused the RH of violent and abusive behaviour towards her which the RH denies, there is no evidence at all that the RH had directed any of his anger at the children or harmed the children in any way or had behaved towards the child in such a way so as to alienate the children towards the RH.

[58] Counsel for the RH further submitted that Mr Raymund, in his cross-examination, had conceded that this is not a child abuse case. Usually, a child abuse case would be referred to the Child Department but in this case the first child came for counselling under Mr Raymund in the Welfare Department.

[59] Counsel for the RH brought to the court's attention that the PW had filed Originating Summons No S8–24–46 of 2009 ('the OS case') at the Kuala Lumpur High Court for custody, care and control of the two children on 4 May 2009. The PW brought the first child for counselling with Mr Raymund. Mr Raymund, in his cross-examination, conceded that he only met the first child on two occasions for less than 40 minutes after which there was a request made by the PW for the counsellor's report (exh P19). The PW never brought the first child back for counselling after that. Counsel for the RH

A further submitted that the counsellor's report was specifically prepared by Mr Raymund for the case, and not for any genuine concern/purpose of addressing the first child's actual state of mind.

B **[60]** Counsel for the RH also submitted that the PW had brought the first child for counselling by Mr Raymund in order to build a case for the RH and to deprive him of custody, care and control, and access to the children. He stated that the process of counselling is a long process and does not stop short of two occasions of meetings ending with a report.

C **[61]** The RH contended that Mr Raymund's report contains hearsay evidence. It contains disputed facts and is used to corroborate the PW's allegation against the RH. The PW had failed to substantiate her allegations of abuse against the RH by hard evidence.

D **[62]** Counsel for the RH submitted that Mr Raymund's report made no mention and gave no consideration of the RH's steady employment, the stable long-term marriage of the parties, etc. The counsellor did not observe the parent-child interaction. Mr Raymund's report does not reveal any physical
E abuse towards the two children.

[63] Counsel for the RH also adopted the same line of argument regarding Dr Subash's medical report (exh P48).

F **[64]** The RH produced several photographs and video recordings to show the good times he enjoyed with the PW and the two children (see CD in exh R181).

G THE COURT'S INTERVIEWS OF THE CHILDREN

First child

[65] The first child was previously interviewed by the former judge.

H **[66]** I interviewed the first child twice ie on 23 September 2011 when she was nine years and six months.

I **[67]** In both interviews by me, the first child expressed a great fear and hatred towards her father due to her memories of physical and verbal abuse by her father. In fact, what the first child informed me is consistent with the evidence of the PW, and the reports of Mr Raymund and Dr Subash. Therefore, it is highly probable that what the PW and the first child are alleging about the abuse by the RH is true.

[68] The first child is intelligent and able to express an independent opinion. She is clear in her wishes in not wanting to see her father at all. She does not love her father and only loves her mother. She only wishes to live with her mother and younger sister. She reacted in fear and cried uncontrollably when I asked her any question to determine whether she would see her father on a regular weekly or fortnightly basis, under supervised access.

[69] From my interviews, I find that the first child is totally alienated towards the RH. She is locked up in her negative thoughts and feelings towards the RH, based on her past experience with him, to the point that she is now unable to give him a chance for the present, or the future. She does not want to have anything more to do with him or face him at any time. In fact, for the second interview conducted just before 4pm, the first child walked into my chambers confidently, looking gleeful. I asked her why was she so happy this time, and she said that the reason is because her father did not come to court at the playroom for his Friday access that day from 3pm–4.15pm. This is a great difference from her composure on the date of her first interview by me where she walked in, cringing in fear and crying and looking around with darting eyes and asking whether her father was anywhere around because he would come and hurt her and beat her, as in the past, and hit her head on the wall.

Second child

[70] I interviewed the second child only once ie on 18 May 2012. She was only four years and five months old, but she could express clearly her wishes that she loves both her mother and father, and wishes to see her father often. She said that her father did not come to court that day to see her and she wants to see him. She repeatedly said that she misses her father.

THE COURT'S EVALUATION OF THE FINDINGS ON ACCESS

[71] The court finds that for the past months, access by the RH at the court premises on Fridays has not been regular. Quite frequently he was absent for access eg on 10 June 2011, 17 June 2011, 24 June 2011, 1 July 2011, 8 July 2011, 15 July 2011, 22 July 2011, 5 August 2011, 12 August 2011, 19 August 2011, 26 August 2011, 2 September 2011, 9 September 2011, 23 September 2011, 30 September 2011, 7 October 2011, 14 October 2011, 21 October 2011, 28 October 2011, 4 November 2011, 18 November 2011, 25 November 2011, 2 December 2011, 9 December 2011, 16 December 2011, 23 December 2011, 30 December 2011, 6 January 2012, 13 January 2012, 20 January 2012, 27 January 2012, 3 February 2012, 10 February 2012, 2 March 2012, 9 March 2012, 23 March 2012, 13 April 2012, 20 April 2012, 4 May 2012, 11 May 2012, 18 May 2012 and 25 May 2012.

[72] For most of the times when the RH was present for access eg on the eight times of access from 10 June 2011–25 May 2012 ie on 29 July 2011, 11 November 2011, 17 February 2012, 24 February 2012, 16 March 2012, 30 March 2012, 6 April 2012 and 27 April 2012, and if both children were together, the children would be screaming or shouting at the RH. The first child would express her great aversion, fear and hatred of her father, and she would be crying and distraught. The second child was very much influenced by the first child's reaction, and would follow her elder sister by crying. However, when the first child was kept outside the playroom with her mother, the RH was able to interact and have a more peaceful and better time of access with the second child in the playroom, in the court premises.

[73] From the video recordings in the CD in exh R181, I find that both parties and the children, at one time in the past when they were living together, had a good family life and relationship, for example:

(a) recording No 6 MV1_0066: shows the family after the baby (second child) was born. The first child is seen happy, prancing in the room at home. The RH and the PW are talking and laughing and calling the first child to see the baby. The first child is having fun, and the RH is singing an Indian song. The PW is smiling with the baby. A happy family is portrayed. The RH is affectionate with his family and keeps singing the song 'Disco'. The first child is laughing;

(b) recording No 5 MV1_0055: shows the RH playing with the baby and the first child hovering around and very happy. The RH is very close to the first child, and both the RH and the first child are huddling together and going to touch the baby at the cot. The happy and enthusiastic voice of the first child is heard, talking together with the father to the baby;

(c) recording No 1 2006-10-2: shows the PW walking in a zoo with the first child, and the RH's voice being heard, looking for the tiger. Both the PW and the RH ask the first child to say something to the camera. The RH is telling the first child to sing 'Hakunamatata'. This recording portrays a happy family relationship; and

(d) the other recordings in the same video show eg:

(i) a few family holidays where the RH and the first child are talking to each other, like in a normal, happy and loving family. One video shows the first child riding on a carousel;

(ii) video 2006-12-2: a trip to Sabah, the PW talking to the first child, and the RH leading the family and singing and telling them 'Let's go' and asking the first child if she likes the water and telling her to come and sit down. The first child is seen very close and happy with the RH. Her happy voice is heard;

(iii) the RH asking the first child if she is happy because there are a lot of presents. Then the RH is singing the Happy Birthday song to the first child and the first child is saying that she likes her various presents, and the RH is saying 'Very good' three times. The RH's voice is heard talking to the first child about the elephant ride;

(iv) another scene at the amusement park, with the RH's voice singing in the background, and the voices of the PW and the first child. This recording shows a happy family, with a good family life;

(v) the RH calling out to the first child in affectionate terms, enthusiastically, asking the first child if she is having breakfast. The first child is holding onto her chair, with a smiling face;

(vi) just before the separation, the RH and the first child at the fish spa, and the first child is smiling;

(vii) in No 2 MV1_0366: the baby crying in the cot and the RH saying 'Sleeping and crying. Huh? Never mind, ok, ok, relax' and the RH touching the baby on the chest and saying 'Enough. Cominglah; and

(viii) in No 4 MV1_0233: the first child dancing with the music and looking very impish, happy, confident and coy, facing her father's camera.

[74] Despite having a good and happy family relationship at one time, due to the frequent marital disputes of the PW and the RH, and the abusive acts and words of the RH, the first child is now completely alienated from the RH. The PW knows this but ever since the reports have been obtained from Mr Raymund and Dr Subash for the purpose of this case, she has failed to make any efforts to take the first child for psychiatric/psychological help or counselling to the point that the first child now harbours an abnormal fear and hatred of her father, based on the child's past experience with the RH. The first child would be lost to the RH forever if no immediate steps are taken to correct whatever is wrong with her mental and emotional state towards her father. This would be detrimental to her wholesome development and growth.

[75] I therefore decided to order that the first child be sent for psychiatric or psychological help or counselling in order to heal her relationship with her father. In the first three months she would not be seeing her father. After the first three months, she would be seeing her father with the presence and assistance of the psychiatrist/psychologist/counsellor. This will be a period to test whether there should be further access given to the RH to the first child after nine months from the date of the order, and if so, whether such access is to be supervised or unsupervised, day or overnight access, and the frequency of access.

[76] As for the second child, the marriage broke up when this child was still a baby. She does not appear to have any negative memories of abuse or violence by the RH. She loves her father very much and misses her father. There is no evidence that the RH had abused the first child directly. This child has the right of access to her father too. It would be wrong to sever ties between the RH and this child due to the PW's fears and allegations that the RH would be dangerous to the children because of his past actions. I therefore decided to allow a weekly supervised access of three hours on every Sunday from 11am–2pm at Mac Donald's restaurant. I do not think that this child would be in any danger or her welfare jeopardised by the weekly access since such access is to be supervised by the PW. I allow either one of the paternal grandparents to accompany the RH for access to the second child to assist in bonding between the RH and the child. It is also for the good of this child to have the love and nurture of not only her father, but that of her paternal grandparents. After nine months from the date of this order, access to this child would be reviewed by this court upon application by either party.

MAINTENANCE FOR THE CHILDREN

[77] The matter of maintenance for a child is governed by ss 92–93 of the LRA which provide as follows:

> 92 Duty to maintain children.
>
> Except where an agreement or order of court otherwise provides, it shall be the duty of a parent to maintain or contribute to the maintenance of his or her children, whether they are in his or her custody or the custody of any other person, either by providing them with such accommodation, clothing, food and education as may be reasonable having regard to his or her means and station in life or by paying the cost thereof.
>
> 93 Power for court to order maintenance for children.
>
> (1) The court may at any time order a man to pay maintenance for the benefit of his child —
>
> (a) if he has refused or neglected reasonably to provide for the child;
>
> (b) if he has deserted his wife and the child is in her charge;
>
> (c) during the pendency of any matrimonial proceedings; or
>
> (d) when making or subsequent to the making of an order placing the child in the custody of any other person.
>
> (2) The court shall have the corresponding power to order a woman to pay or contribute towards the maintenance of her child where it is satisfied that having regard to her means it is reasonable so to order.

(3) An order under subsection (1) or (2) may direct payment to the person having custody or care and control of the child or trustees for the child.

[78] The RH is an engineer by qualification. He used to work for big organisations such as Shell, DNV and Aker Solutions. He used to earn a high salary eg RM8,000 after his promotion in 2004 or 2005 in Shell, RM14,000 in DNV in 2008, and RM17,000 in Aker Solutions in 2009.

[79] The RH contended that he was arrested by the police on 12 June 2009 after the PW falsely and maliciously lodged a police report against him. As a result of the arrest, in July 2009 the RH was asked to resign from his company and he lost his job in August 2009. He alleged that the PW ruined his career and he can no longer be employed by big corporate organisations which require an employee to be free from any criminal record.

[80] Since he could not get employment, the RH registered a company, Gunina Solutions Sdn Bhd ('Gunina'), at the end of 2009. He is now self-employed. The owners and Directors of Gunina are the RH's parents. The RH is not the owner or shareholder of Gunina, but he is the managing director. Throughout his employment with Gunina, the RH's salary was RM6,000 (see BOD E p 7 for payment of salary into his bank account) but it dropped to RM3,000 a month at the end of 2010. The RH did not disclose his current salary.

[81] In cross-examination, the RH admitted that he has been collecting a rental of RM700 per month from June 2008 up to November 2010 in respect of the first property and a rental of RM1,200 since July 2009 till to date in respect of the second property. He failed to produce the tenancy agreement although the same was asked in the PW's notice to produce as well as in cross-examination.

[82] Given his present circumstances, the RH is offering maintenance of RM500 per month for two children. He submitted that he has no permanent job and therefore no regular income. The business in Gunina is just starting. The RH is willing to increase the amount if he gets a steady employment and as his financial situation improves.

[83] The PW is praying for a maintenance of RM4,000 per month for two children. The PW has a steady job, being employed as a corporate counsel in Land and General Bhd, a developer's firm, and earning a monthly salary of RM3,000 at one time. The PW did not disclose her current salary though she stated that the monthly expenditure for two children is RM4,110.60. She is also withdrawing her claim for maintenance for herself from the RH.

[84] The RH is unable to pay RM4,000 a month as maintenance for the two children. His income is unstable. Even though he collects rental from the two properties, he is also paying for the assessment, quit rent, and maintenance of the respective properties, and the housing loan for the second property.

[85] After considering the financial situation of both parties, I am satisfied that a reasonable sum of maintenance that the RH should pay for the two children is RM1,200 per month from the date of this order until the child attains the age of 18 years.

[86] As for past maintenance for the children, I order the RH to pay a maintenance of RM600 per month for two children from the date of filing of the petition until the day before the date of this order.

DIVISION OF MATRIMONIAL ASSETS

[87] Section 76 of the LRA provides as follows:

76 Power for court to order division of matrimonial assets

(1) The court shall have power, when granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or the sale of any such assets and the division between the parties of the proceeds of sale.

(2) In exercising the power conferred by subsection (1) the court shall have regard to —

(a) the extent of the contributions made by each party in money, property or work towards the acquiring of the assets;

(b) any debts owing by either party which were contracted for their joint benefit;

(3) The court shall have power, when granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired during the marriage by the sole effort of one party to the marriage or the sale of any such assets and the division between the parties of the proceeds of sale.

(4) In exercising the power conferred by subsection (3) the court shall have regard to —

(a) the extent of the contributions made by the other party who did not acquire the assets to the welfare of the family by looking after the home or caring the family;

(b) the needs of the minor children, if any, of the marriage;

and subject to those considerations, the court may divide the assets or the proceeds of sale in such proportions as the court thinks reasonable; but in any case the party by whose effort the assets were acquired shall receive a greater proportion.

(5) For the purposes of this section, references to assets acquired during a marriage include assets owned before the marriage by one party which have been substantially improved during the marriage by the other party or by their joint efforts.

[88] From the above s 76, it is clear that any property acquired during the marriage by the joint efforts of a husband and wife is a matrimonial asset. This asset must be divided by the court at the time when the court makes the decree of divorce.

[89] The guiding principle under s 76(2) of the LRA is for the court to incline towards equality of division of the matrimonial assets if both parties have acquired the asset by their joint efforts. In this case, the party who made more monetary contributions and put in more effort to acquire the asset shall receive a greater proportion.

[90] However, the party who made less monetary contributions or no monetary contributions at all to acquire the asset can be given a proportion of the asset after the court has regard to the extent of contributions made by such party to the welfare of the family by looking after the home or caring the family.

PW'S EVIDENCE ON THE PROPERTIES

[91] The first property was purchased in the joint names of the PW and the RH (see sale and purchase agreement dated 23 August 2001 at pp 5–12 of BOD C ie exh P1, and the memorandum for transfer at pp 13–10 of BOD C ie exh P2).

[92] The second property was also purchased in the joint names of the PW and the RH (see sale and purchase agreement dated 4 July 2007 at pp 17–33 at BOD C ie exh P3, and Forms 11 AK and B1 at pp 46–48 of BOD C ie exh P4).

[93] The PW gave evidence that she has been paying the RH a sum of RM1,000 on a monthly basis, which sum she would withdraw from her Maybank saving account (exh P158). The RH would then pool the money received from the PW and use it to pay the housing loan and other outgoings.

[94] The RH was always overseas for working assignments, and the PW would look after and maintain the properties. While living at both properties,

the PW did all the household matters like cleaning, cooking, upkeeping, caring and bringing up the children at home, and other general duties in taking care of the home.

[95] There is no evidence to show that when the PW withdrew the RM1,000 per month, that sum of money went straight towards paying for the housing loan and outgoings. No receipts were produced by her though she claimed that she did pay for the assessment of the properties on one or two occasions. However, it is highly probable that the PW was giving RM1,000 per month to the RH because in 2005 the RH was only earning RM1,979.37 per month (ie RM23,752.46 for 12 months) (see RH's EA Form for income tax as in exh P190).

[96] Counsel for the RH submitted that the RM1,000 was never stated in her pleadings and it is now raised as an afterthought. I am of the view that the actual amount of contribution does not have to be pleaded. The PW only has to plead that she is entitled to a share of the matrimonial assets. In this case, she has pleaded for a ¼ share of the matrimonial assets. The PW's contributions have to be proven by evidence adduced during the trial. Evidence does not have to be pleaded.

[97] The PW's other contributions regarding the properties are in dealing with all the documentation pertaining to the sale and purchase agreement of the second property. She liased with the lawyer in Malaysia. The RH was busy with his work overseas and did not have the time to arrange all this. The PW contended that she did all the arrangements and coordination for the sourcing of the contractor for renovation, including arranging for the lorry driver to shift out from the first property to the second property. She also sourced for a tenant for the first property (see BOD B pp 99, 100, 103 and 104).

[98] The PW also contended that even though she is the joint owner of the properties, the total rent for both properties was collected by the RH. The RH had admitted that he has been collecting the rental of RM700 per month from June 2008 to November 2010 for the 1st property and the rental of RM1,200 since July 2009 till to date.

RH'S EVIDENCE ON THE PROPERTIES

[99] The RH contended that the RM1,000 was withdrawn by the PW for her own use, and also to support her old and ailing parents. He further contended that the PW was earning less than him and he was the one paying for all the household expenses, and the housing loans, assessments, quit rent,

maintenance etc for the properties. He had to give the PW a supplementary credit card for her expenses and household bills and also to maintain the children.

[100] The RH further contended that the two properties were not acquired by the joint efforts of both parties. Instead, they were acquired by his sole efforts.

[101] He stated that over the years he had to bear the sole brunt of repayment of the housing loans for the two properties. He admitted that the properties were purchased during the marriage but acquired over the years, with the second property not yet fully acquired because it is still under a bank loan.

[102] Regarding the first property, the RH submitted the PW did not dispute that he paid the deposit, including the monthly instalments for the bank loan. The total purchase price for the first property is RM173,000 and the RH had paid a sum of RM13,880 towards the deposit using his own money without any contribution from the PW. He paid it by his personal cheque No MBB709242 dated 28 August 2001 (exh R58). The RH also withdrew his EPF savings amounting to RM97,886.31 to help finance the purchase of the first property without any contribution from the PW (exh R59).

[103] The RH initially took a housing loan from Malayan Banking Bhd ('MBB') to finance the purchase of the first property. Subsequently, he re-financed it with a loan from Standard Chartered Bank Bhd. The RH maintained that he paid for all the monthly instalments to MBB without any contribution from the PW. He even took an assurance policy in his name from Maybank life to insure the loan sum in the event of his death (exh R60). The RH showed the letter from MBB (exh R174) confirming his full settlement of the MBB loan before he re-financed it with Standard Chartered Bank. Exh R175 is proof of the balance of payment to MBB. Exhibit R61 proves that the RH paid the sum of RM19,246.33 to Messrs Tan Ah Lak & Co, the solicitors for MBB, for the shortfall that the RH needed to pay to MBB.

[104] As for payment of all the monthly instalments to Standard Chartered bank, the RH transferred moneys from his MBB personal, account No 314123016161 into the Standard Chartered Bank housing loan account No 312-1-2074754-3 on a regular basis. This is a flexi loan and the RH pumped in large amounts of monies into the home loan account.

[105] The RH registered the ownership transfer of the first property with Majlis Perbandaran Selayang under his name since he is the one paying towards

the instalments. He used to pay the assessment fees by cash. Sometimes he paid online by way of a bank transfer (see exh R65(a)–(b)).

[106] The RH showed proof of his payment of the management maintenance for the condominium ie the first property. He lost most of the receipts while moving out from the matrimonial home but he retained a copy of the payment receipt of RM1,515.36 (exh R66) as proof of payment by him. The utility bill for the first property is under the RH's name and he stated that he paid towards all utility bills including the electricity bills ever since they moved into the first property (see exh R67). The RH showed the receipts in exh R176 to prove that he maintained and furnished the matrimonial home including the first property.

[107] Regarding the second property, the RH stated that even though this property is in joint names, the PW never paid her share of the purchase price. He gave evidence that he, by his sole efforts, paid for this property from the time of purchase.

[108] The total purchase price of the second property is RM375,000. The RH paid RM37,500 towards the deposit for the second property. The property was acquired in June 2007 and vacant possession was given some time in October 2007. Going by the PW's evidence, the marriage was already on the rocks from 2008. The PW and the children had left the matrimonial home temporarily in April 2008. They left the matrimonial home for good on 12 April 2009.

[109] The RH contended that the PW made no contribution at all to the acquiring of the second property. He took a housing loan of RM337,500 from HSBC Bank Bhd to finance this property, and his HSBC Bank Bhd Home Smart Loan Account is 355-017344-101.

[110] The RH showed proof of his payment towards the monthly instalments of the second property, as can be seen from the exhibits in BOD E ie exhs R70–96, and R101–106. Until today, the RH is still paying for the second property.

[111] The RH also registered the ownership transfer of the second property with Majlis Bandaraya Petaling Jaya ('MBPJ') under his sole name and he paid all the assessment fees to MBPJ (BOD E, pp 109–112).

[112] The RH denied that the PW had on one or two occasions paid for the assessment of the second property. He maintained that he always paid such assessment by cash or by online payment (BOD E, pp 109–112, and ID–R107).

[113] The RH produced some receipts but they are only marked as ID–R108 (BOD E pp 118–154). A

[114] Here again, for the second property, the RH denied that the PW withdrew and gave him RM1,000 monthly from her salary to pay for the second property. He also denied that she paid the assessment for this property on one or two occasions. He contended that the PW used the RM1,000 for herself, and her old and ailing parents. Whatever the PW earned was not enough, and the RH had to give the PW a supplementary credit card. B

DIVISION OF THE TWO PROPERTIES C

[115] Regarding the first property, in view of the fact that it was purchased on 23 August 2001 and is now already fully paid for, the PW should be given a 30% share and the RH a 70% share of the property. The parties were married on 12 February 1999. The PW left the matrimonial home permanently on 12 April 2009, about ten years two months after the marriage. In the early years of their marriage, the RH was not earning as much as he did towards the later years eg he was promoted to senior risk engineer by 1998 at liberty risk services. Before the promotion, his salary was RM3,000 per month. After the RH's promotion, his salary was RM4,300 per month. Then he worked for Unisys from 2000–2002, with a starting salary of RM4,300 and later the salary was increased to RM4,800. He worked for Shell from 2002–2007. Before his promotion in 2004 or 2005, his gross salary was RM7,000 or RM8,000. After his promotion, his salary increased to close to RM10,000. He received a bonus of two months' salary. Then he moved to DNV. His starting salary was RM13,000. Within a year, his salary went up to RM14,000. Close to 2009, the RH moved to Aker Solutions. His salary was RM17,000. D E F

[116] There is hardly any evidence adduced of the PW's salary during her early years of work, after her marriage. Now she is earning more than RM3,000. It is highly probable that she did not earn much even at the time of her marriage or until she left the matrimonial home. It is also highly probable that at all times the RH was earning more than her, and he is the one who made more monetary contributions to the acquiring of the first property. The PW's main contribution is to the welfare of the family by looking after the home or caring the family, in particular, the two children especially when the RH was frequently on working assignments overseas. G H

[117] It is probable that the PW did withdraw RM1,000 every month from her salary. Any employee would need to withdraw one's salary for one's expenditure. However, it is not proven that the RM1,000 withdrawn by the PW was given to the RH every month just to pay for the properties. It is highly probable that she would have used some, if not all, of the RM 1,000 for her I

personal expenses and for the expenses of her old and ailing parents. The evidence shows that she is very close to her parents, and she and the children spend a lot of time at her parents' house. That, in fact, is also one of the causes for the breakdown of the marriage since it bothered the RH very much.

[118] Therefore, in my opinion, a 30% share of the first property is the appropriate share for the PW, given her above contributions, and the length of the marriage.

[119] As for the second property, apart from the above considerations regarding the PWs contributions, I also considered that at the time of the purchase of this property on 4 July 2007, the RH was already earning a high salary of RM10,000 a month. After that, he moved from Shell. Between 2002 to 2009 onwards, before his resignation, the RH was earning a salary of between RM13,000 to RM17,000 a month. Here again, it is clear that the RH is the one making the most, if not all, of the monetary contributions towards the acquiring of the second property. The PW's contributions were made at the early stage of the acquiring of the property eg she confirmed the purchase of the property since the RH was still working overseas. She coordinated with the lawyer for all the agreements and documents. She did all the arrangement and coordination for the sourcing of the contractor for renovation, including arranging the lorry driver to shift from the first property to the second property. At this point, the marriage was already going downhill. In April 2008 she and the children left the RH temporarily, and she spent a lot of time at her parents' house. It cannot be said that at this time she was caring for the RH or the home. However, most of the time, she was caring for the children. During this time too, it is highly improbable that she was withdrawing RM1,000 from her monthly salary to give to the RH to pay for the second property when the marriage was breaking down. Neither is it probable that she was paying for the assessment of this property on one or two occasions, as she had contended.

[120] Given the short period of her non-monetary contributions from 2007 to 2009, I am of the view that the PW should only be given a 15% share of the second property, and the RH a 85% share of the property. There is clear evidence that the RH acquired the second property almost by his sole monetary contributions.

[121] In arriving at the above shares for the division of the two properties, I have already factored in the fact that the RH was also collecting the rental of both properties which, he contended, had been used towards the two properties ie paying the housing loans, maintenance and outgoings, etc. There is therefore no necessity for me to go into the accounting for the recovery of past rental by the PW from the RH (see *Sivanes a/lRajaratnam v Usha a/p Rani Subramaniam* [2002] 3 MLJ 273; [2002] 3 CLJ 300 at pp 306, 308, 310 and

311).

PW'S CLAIM FOR RETURN BY THE RH OF THE JEWELLERY OF THE PW AND THE CHILDREN

[122] I dismissed this claim because no cogent evidence was adduced by the PW to prove this claim. There is no evidence to show that the jewellery are matrimonial assets acquired during the marriage and that such assets ought to be divided by the court under s 76 of the LRA. At best, this claim may be the subject matter of a separate civil suit.

RH'S OTHER CLAIMS IN THE CROSS-PETITION

[123] In his cross-petition (encl 9), the RH claimed under para 141(e)(i)–(iv) respectively for the following:

141 (e) That the PW returns —

(i) marriage jewellery and thali amounting to RM50,000;

(ii) RM10,000 for the cars purchased by the RH for the PW;

(iii) RM48,000 (RM500 monthly) that was given to the PW's mother;

(iv) RM12,600 withdrawn by the PW from the HSBC joint account without the RH's consent.

[124] Regarding the claims in para 141(e)(i)–(iii), there is insufficient or no cogent evidence to prove the claims. The claim in prayer 141(e)(i) cannot be decided under s 76 of the LRA since there is no proof that the marriage jewellery and thali are matrimonial assets acquired during the marriage by the joint efforts of both parties. If these have not been acquired during the marriage, but instead had been given by the RH as gifts to the PW before or at the time when the marriage was contracted, then they remain as gifts to the PW. I therefore dismissed the claims in para 141(e)(i)–(iii).

[125] As for the claim in para 141(e)(iv), the evidence shows that this is a HSBC joint account. Under the instructions of both parties to the bank, either party can withdraw from this account. There is no injunction applied for by the RH under s 102 of the LRA to restrain the PW from dealing with this account. Therefore, the PW was entitled to withdraw the RM12,600 from this joint account at the material time. This claim by the RH is dismissed.

PSYCHIATRIC EVALUATION OF THE RH

[126] In her divorce petition (encl 1) the PW prayed, inter alia, for an order

that the RH obtains a medical certificate on his mental state of mind from a Government Hospital before seeking access.

[127] In his answer and cross petition (encl 9), the RH prayed, inter alia, that the PW be examined by a psychiatrist as to the mental state of mind and capability as a mother and a report be given to this court within 60 days from the date of this order.

[128] Since at the outset of the hearing, counsel for the RH informed the court that custody, care and control of the children is not an issue, and considering that the children have been cared for and living with the PW all this while since they left the matrimonial home in 2009, I decided to allow the PW to continue to have custody, care and control of the children. I also ordered that she be given guardianship of the children for the reasons stated earlier in this judgment.

[129] There is no evidence of abuse or violence by the PW towards the children, or anything to prove that she is an unfit mother. The children love her and want to live with her. Therefore, there is no necessity for the court, at this stage, to order a psychiatric evaluation of the PW to determine her fitness as a mother who should be given sole guardianship, custody, care and control of the two children. However, if subsequently, it is found that the first child, even after repeated treatment/counselling by the psychiatrist/psychologist/counsellor, is still not developing well and is reacting with abnormal fear or hatred towards the RH due to alienation caused by the PW, the court may review the matter to decide whether the PW should also be subject to a psychiatric evaluation to confirm whether she has the right parenting skills and is a fit person to have continued sole guardianship, and custody, care and control of the children.

[130] In a situation where both parents are unfit to have guardianship, and custody, care and control of the children, the court has a duty for to appoint a suitable third party to exercise such responsibility for the welfare and best interests of the children (see also s 89(2)(a) of the LRA, and the Court of Appeal decision in *Ananda Dharmalingam v Chantella Honeybee Sargon (P) and other Appeals* [2007] 2 MLJ 1; [2007] 1 CLJ 481 at pp 493–496).

[131] As for the RH, it is without doubt that he loves both his children very much and is fighting all that he can to have access to his children before it is too late, and before he loses them forever to the PW. However, much as the RH professes to love his children, the evidence shows that he has anger issues, and is potentially capable of getting angry frequently to the point that he can be abusive verbally, emotionallyor physically towards the object of his anger. Therefore, here again, for the welfare and best interests of the children, the

court finds it imperative that he undergoes a psychiatric evaluation which report would assist the court in determining, after nine months from the date of this order, whether to allow continued supervised access, or unsupervised access, extended access, overnight access, or no access at all to the two children by the RH.

[132] The RH started off well by going to see Urmillah Dass (RW2), a consultant clinical psychologist, for psychological counselling regarding his marriage and children. After three sessions on 9 July 2011, 11 July 2011, and 13 July 2011, and after getting RW2's report for the purpose of this trial, the RH has stopped going to see RW2. The court is not ordering the RH to undergo continuous psychiatric treatment or counselling, but it would be for the benefit of the RH to seek professional help for anger management and acquiring proper parenting skills. This would certainly be for the welfare and best interests of the children.

[133] Based on the above reasons, I ordered accordingly.

Order accordingly.

Reported by Kohila Nesan